# STATE OF MICHIGAN

# COURT OF APPEALS

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| BERNICE RICHMOND,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>August 12, 2008 |
| V | No. 278177<br>Genesee Circuit Court |
| GARY W. STROUP and BERNICE L. LONG-STROUP,<br><br>Defendants-Appellees. | LC No. 06-084311-NI |

Before: Markey, P.J., and White and Wilder, JJ.

Judge Wilder (*dissenting*).

I respectfully dissent. Under the no-fault act, tort liability, for noneconomic damages arising out of the ownership, maintenance, or use of a motor vehicle, is abolished, subject to certain well-defined exceptions. MCL 500.3135(1). In other words, "[a] person remains subject to tort liability for noneconomic loss arising out of her ownership, maintenance or use of a motor vehicle *only if the injured person has suffered* death, *serious impairment of a body function*, or permanent serious disfigurement." MCL 500.3135(1) (emphases added); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCL 500.3135(1) evidences a legislative "intent that the 'serious impairment of body function' requirement be as significant an obstacle to recovery as that posed by the requirement of permanent serious disfigurement and death." *Netter v Bowman*, 272 Mich App 289, 305-306; 725 NW2d 353 (2006). A primary goal of the Michigan no-fault act was to abridge the available remedies for auto-negligence, in exchange for first-party insurance protection by articulating the requirements set forth in MCL 500.3135. *Churchman v Rickerson*, 240 Mich App 223, 229; 611 NW2d 333 (2000). As such, although the no-fault act is generally construed broadly because it is remedial in nature, "a liberal construction of § 500.3135 is not warranted." *Churchman, supra* at 228-229.

The material facts are not seriously disputed. Dr. David Fernandez, plaintiff's consulting physician in the emergency room, diagnosed a left distal radius fracture. He placed her left arm in a short-arm cast. Plaintiff's right ankle was also fractured, and placed in a splint. Plaintiff also had a broken rib.

On January 18, 2006, Dr. Fernandez removed the splint on plaintiff's right ankle and prescribed an air cast. Dr. Fernandez gave plaintiff a disability release from work, for January 18, 2006, to March 20, 2006. Plaintiff saw Dr. A. George Dass on January 30, 2006. He and

plaintiff elected nonoperative management of plaintiff's injuries (an indication of how relatively minor plaintiff's injuries were). Dr. Dass recasted plaintiff's short-arm cast.

On February 22, 2006, Dr. Dass removed plaintiff's short-arm cast. Dr. Dass also determined that plaintiff could return to work on March 26, 2006. He did not restrict her activities in any way.

Plaintiff began occupational therapy for her left wrist, with Marla Marrs, on February 23, 2006. When plaintiff was discharged from therapy, on June 25, 2006, she reported no wrist pain at rest, and reported her wrist pain level, in an active state, at three (on a scale of one to ten). In the discharge evaluation, Marrs reported that plaintiff could drive, launder clothes, use a keyboard, grip items and manipulate buttons and zippers. She also reported that plaintiff avoids lifting heavy objects.

Despite Dr. Dass's release allowing plaintiff to return to work on March 26, 2006, plaintiff quit her MTA job. She explained that her left wrist fracture prevented her from typing at high speeds, for eight to ten hours per day, without "feel[ing] the difference."

In April 2006, plaintiff began a new part-time[1] position selling life insurance and annuities, which she prefers to her MTA job. At her deposition, plaintiff stated that she is able to complete the tasks required by her new job. But in a subsequent affidavit filed at the hearing on defendant's motion for summary disposition, plaintiff stated that her husband drives her to clients' homes to assist her in entering and exiting the car and walking to the doors.

On May 22, 2006, plaintiff visited Dr. Dass to report pain in her right ankle, and difficulty wearing high heels. Dr. Dass anticipated that her ankle would suffer a delayed union. He prescribed a walking boot and bone stimulator. He also released her from work until July 24, 2006. When plaintiff continued to report pain to Dr. Dass, on July 19, 2006, he referred plaintiff to Dr. Susan Mosier-LaClair for a surgical consultation. On July 20, 2006, Dr. Mosier-LaClair recommended surgery on plaintiff's right ankle. The surgery occurred on August 28, 2006.

On September 8, 2006, plaintiff visited Dr. Mosier-LaClair for a follow-up appointment. In a report to Dr. Raffee, Dr. Mosier-LaClair stated that plaintiff's "ankle looks great." After surgery, Dr. Mosier-LaClair provided plaintiff with a disability release from work until October 6, 2006. Afterward, plaintiff was limited to movement with crutches for four additional weeks.

In a "Disability Certificate" to plaintiff's attorneys dated October 27, 2006, Dr. Mosier-LaClair stated that plaintiff was restricted from housework and caring for personal needs that "involve[d] bending, lifting, twisting, and prolonged standing," until January 31, 2007. After these restrictions ended, plaintiff testified that she was only instructed to avoid activities "that might hurt [her]."

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[1] Plaintiff's counsel admitted that plaintiff was not working part-time because of physical limitations, but because that was the only position she could find when she voluntarily abandoned the dispatcher position.

At deposition, plaintiff testified that she suffered from pain in her chest, and was unable to lie on her side. But after three months, these problems ceased. For the first nine months post-accident, plaintiff needed assistance to care for herself, and she cannot wear high-heels. She must take breaks, and stretch her ankle, after driving more than two hours. Plaintiff must rest after standing more than one hour.

Plaintiff also testified that she continued to take ibuprofen and hydrocodone daily because of the injuries resulting from the accident. But plaintiff's doctors released her from treatment for these injuries, and she need not visit a doctor again unless she experiences physical problems.

Residual impairment is not established by self-imposed restrictions based on perceived or even real pain. *Kreiner, supra* at 133 n 17; *McDaniel v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). In *Kreiner,* the plaintiff limited his workday from eight to six hours, could not stand on a ladder for more than twenty minutes, or lift more than 80 pounds, after his accident. *Kreiner, supra,* at 137. However, these limitations did not prevent him from performing his job. *Id.* Consequently, the Supreme Court held that his impairment did not affect his overall ability to conduct the course of his normal life. *Id*.

Here too, plaintiff's doctor determined that she could return to her dispatcher position without restrictions, two and one-half months post-accident. Also, when plaintiff completed occupational therapy five months post-accident, her therapist reported, without qualification, that plaintiff could use the keyboard. Still, plaintiff chose to quit her dispatcher position. Because health professionals determined that plaintiff was physically capable of fulfilling her work duties, plaintiff's self-imposed restriction does not establish a serious residual impairment. *Kreiner, supra* at 133 n 17; *McDonald, supra* at 282-283.

Furthermore, plaintiff had an extensive background in insurance prior to the accident, and stated that she prefers her new insurance position to the dispatcher position. The trial court noted that she had made no claim of difficulty in performing that job in her deposition, and I agree with the trial court that plaintiff improperly attempted to impeach her own deposition testimony on this point by submitting a subsequent affidavit that she needed her husband's assistance to do her insurance job. E.g., *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997).

"[A] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Kreiner, supra* at 137. While I in no way seek to minimize the fact that plaintiff had injuries which caused negative effects on her life for some period of time, I cannot agree with the majority that the course or trajectory of plaintiff's life, "considered against the backdrop of [her] preimpairment life," *Kreiner, supra* at 137, is so different that it affected plaintiff's 'general ability' to conduct the course of her normal life. *Id.*

For the foregoing reasons, I would affirm the trial court's order granting summary disposition in defendant's favor.

/s/ Kurtis T. Wilder